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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 277

UTAH PHARMACEUTICAL ASSOCIATION, *Appellant*

v.

UNITED STATES OF AMERICA, *Appellee*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

BRIEF OPPOSING MOTION TO AFFIRM

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Pursuant to Rule 16, Paragraph 3, of the Revised Rules of this Court, Appellant Utah Pharmaceutical Association opposes Appellee's Motion to Affirm and asserts that the questions presented are substantial and merit the consideration of this Court.

Appellee's argument is devoted to a consideration of the five Questions Presented at pages 3 and 4 of Appellant's Jurisdictional Statement in the order in which they appear. For convenience, the same sequence will be observed herein.

ARGUMENT

1. Absence of Flow of, or Affect Upon, Interstate Commerce

Appellee would have this Court affirm the judgment of the court below on the stated jurisdictional basis that "the questioned activities of the [Appellant] Association affected interstate commerce and that the goods involved were in the flow of interstate commerce at the time with which we are concerned" (J. S., 7a; Motion to Affirm, p. 7). Appellee misconceives the basis upon which Appellant contends that the court below lacked jurisdiction over this case under Section 1 of the Sherman Act.[1]

The Complaint charged that Appellant and others engaged in a conspiracy to restrain interstate commerce in *prescription* drugs in the State of Utah.[2] The Complaint did not charge a restraint directed at interstate commerce in those manufacturer pre-compounded drugs which are eventually dispensed pursuant to prescription orders.[3] Drugs become *prescription* drugs only upon the issuance of prescription orders by duly licensed medical practitioners. Until that event occurs a prescription drug cannot exist.[4]

In the present appeal, the prescription drugs existed only within the State of Utah. As a consequence, they never were at any time in the flow of interstate commerce, much less the "flow of interstate commerce at the time with which we are concerned", (J. S., 7a),

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[1] 15 U.S.C. Section 1, as amended.

[2] Complaint, p. 4, paragraph 11.

[3] *Ibid.*, pp. 4-5, paragraphs 11 through 13; J. S., p. 22a (T. S., I, 5, 7.)

[4] J. S., p. 7.

because they never in the first instance entered the flow of interstate commerce.[5]

Similarly, and for the same reasons, the court below could not have properly concluded that the activities of Appellant *affected* interstate commerce. Inasmuch as prescription drugs do not exist in interstate commerce and are wholly intrastate events, Appellant could not have "engaged in a combination and conspiracy in unreasonable restraint of the aforesaid interstate trade and commerce *in prescription drugs* * * * ". (Emphasis supplied)[6]

Even if we ignore for the moment Appellant's continuing assertion that Appellee has abandoned its reliance upon the "affecting" theory (J. S., p. 7), that theory affords no jurisdictional basis for the judgment below. Appellant invites the Court's attention to the failure of the court below to find the questioned activities of Appellant had a direct and substantial effect on interstate commerce in *prescription* drugs. In the absence of that prerequisite finding, there is no basis upon which this Court may affirm the judgment below on the "affecting" theory.[7]

As has been stated, *prescription* drugs, and not precompounded medicinal substances, form the subject matter of the Complaint in this case.[8] For that reason there was no practical continuity of movement as was present in *United States* v. *Chrysler Corporation Parts*

[5] *Page* v. *Work*, 290 F. 2d 323, 331 (C.A. 9th, 1961); cert. den 368 U.S. 875 (1961).

[6] Complaint, p. 4, paragraph 11.

[7] *Page* v. *Work*, *supra*, at page 332; *Mandeville Is. Farms, Inc.* v. *American C. S. Co.*, 334 U.S. 219, 234-238 (1948).

[8] Complaint, p. 4, paragraph 11.

Wholesalers, Northwest Region, et al.,[9] relied upon by Appellee. However, even if we assume that pre-compounded medicinal substances formed the subject matter of this case, there would be no basis upon which to conclude that there was a continuance of movement in the flow of interstate commerce. Under the rule announced in *Binderup* v. *Pathe Exchange, Inc.*,[10] the question as to whether there has been a continuance of such movement depends upon the intention of the parties to the movement. A fair assessment of the record in this case requires the conclusion that the parties to movements of substances never intended that there be a continuous and uninterrupted movement of such substances from manufacturer to consumer. All medicinal substances in this case were moved to provide for future prescription orders calling for their employment.[11] If the parties to this movement designed to meet a prospective demand had intended a practical continuity of movement into the hands of consuming patients, they would have been engaged in a criminal conspiracy to violate both Federal and Utah pharmacy laws declaring it illegal to dispense prescription drugs except pursuant to prescription orders of duly licensed medical practitioners.[12] Obviously, the parties did not conspire to violate such pharmacy laws. They intended that such pre-compounded medicinal substances would come to rest on pharmacists' shelves and await the issuance of prescription orders for them. Accordingly, there is no basis for holding that such movement con-

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[9] 180 F. 2d 557 (C.A. 9th, 1950); cited at page 8 of Appellee's Motion To Affirm.

[10] 263 U.S. 291, 309 (1923).

[11] J. S., p. 9.

[12] *Ibid.*, p. 7; J. S., 22a (T. S., I, 4.)

tinued uninterruptedly from manufacturer to consumer.

Appellee relies upon *United States* v. *Sullivan*,[13] as dispositive on the question as to whether Appellant's activities affected interstate commerce. It is important to note that *Sullivan* did not involve a consideration of the Sherman Act. As was noted in the Jurisdictional Statement,[14] this Court upheld the power of Congress under the Commerce Clause to provide in the Federal Food, Drug, and Cosmetic Act that the sale of a prescription drug, as opposed to its proper dispensing pursuant to a prescription, after shipment in interstate commerce is a criminal act of misbranding. However, this Court has never determined whether the Sherman Act extends beyond the event considered in *Sullivan* (misbranding as a result of a sale of a prescription drug) and regulates the transaction here in question, the dispensing of a prescription by a pharmacist to a patient, a wholly intrastate activity. For these reasons, *Sullivan* could hardly be said to be dispositive of the intrastate commerce issue presented in this appeal.

In view of the distinction heretofore made by Appellant between prescription drugs and pre-compounded medicinal substances, it would seem unnecessary to respond to Appellee's reliance upon *United States* v. *General Motors Corp.*[15] for the point that any restraint affecting the retail market necessarily affects the wholesale market. Unlike the product involved in *General*

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[13] 332 U.S. 689 (1948).

[14] J. S., p. 17.

[15] 121 F. 2d 376 (C.A. 7th, 1941); cert. den. 314 U.S. 618 (1941).

Motors Corp., prescription drugs are not manufactured. They do not at any time have a situs or existence outside the State of Utah. In addition, the execution of a prescription order by a duly licensed physician is an uncontrollable factor present in this case which is of the type absent in *General Motors Corp.* where the continuity of movement was planned. It follows from the foregoing that Appellant's activities could not be said to "necessarily affect" interstate commerce in prescription drugs as was charged in the Complaint.

It is asserted that Appellant's reliance upon *Eli Lilly And Co.* v. *Say-On-Drugs, Inc.*[16] is misplaced.[17] Appellant's reliance upon *Eli Lilly* is premised upon the fact that the present case and *Eli Lilly* are factually indistinguishable insofar as concerns the intrastate character of the transactions referred to therein between pharmacists and patients. Because of that factual similarity, the rule announced in *United States* v. *South-Eastern Underwriters Asso.*[18] would not appear to be controlling in this case.

2. Applicability of Sherman Act to Learned Profession of Pharmacy

The applicability of the Sherman Act to the practice of pharmacy as a learned profession has never been considered by this Court. Such a determination would affect the status of pharmacists throughout the United States and would bear directly upon the proper disposition of the same question presented in four other liti-

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[16] 366 U.S. 276 (1961); reh. den. 366 U.S. 978 (1961); J.S., p. 16.

[17] Motion to Affirm, p. 10.

[18] 322 U.S. 533 (1944).

gations.[19] If Appellant is correct in its contentions, the court below lacked jurisdiction over the present case. Clearly, this question is substantial.

Appellee says that professional status is of no significance here and that the manufacture and sale of prescription drugs are clearly "trade" within the meaning of the Sherman Act.[20] Appellee thereby ignores the distinction between prescription drugs and mere drugs which has been noted repeatedly herein.[21]

Appellee's contentions rest heavily upon the Government's interpretation of *American Medical Association v. United States*.[22] That case decided only that it was illegal under the Sherman Act for physicians to conspire to restrain the business of health insurance. That case neither reached nor decided the question here presented as to whether it likewise is illegal for members of the pharmaceutical profession to restrain the practice of pharmacy.

In referring to the sale of prescription drugs as "clearly trade" and in referring to the offense in the present case as a "restraint on the sale of prescription drugs",[23] Appellee not only begs the question as to the nature of the commerce in prescription drugs here

[19] J.S., p. 15. One such case, *Northern California Pharmaceutical Association* v. *United States*, C.A. 9th, decided June 27, 1962, is pending before this Court on Petition for a Writ of Certiorari in No. 276.

[20] Motion to Affirm, pp. 11, 12.

[21] J.S., p. 8.

[22] 317 U.S. 519 (1943).

[23] Motion to Affirm, pp. 11, 12.

drawn in question but also disregards those pharmacy laws of the State of Utah which restrict to duly registered pharmacists the right to distribute prescription drugs to patients.[24]

Appellee's contention that the pricing schedules in question regulated "only the gross return" of the pharmacy[25] as a business omits the fact that those schedules specifically provided dollar increments for suggested professional fees in computing the total charge to be made in dispensing the prescription. These schedules provided arithmetical tabulations whereby the individual pharmacist, taking into account his actual ingredient cost and the quantity prescribed, could calculate both his professional fee and the total charge to be made for any one of a multitude of prescription drugs.[26] Considered in their true light, it thus appears that the existence of the pricing schedules does not, *per se*, control the determination of the question as to whether pharmacy is a profession subject to the provisions of the Sherman Act.

3. Absence of Conspiracy

Contrary to Appellee's assertion,[27] Appellant does not admit that use of the pricing schedules involved would necessarily result in uniform prescription pricing. Uniformity of pricing would result only upon the stated condition (J.S., p. 19) that different pharmacists utilized identical cost factors and slavishly fol-

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[24] J.S., p. 7.

[25] Motion to Affirm, p. 12.

[26] T.S., I, 13-16, 19.

[27] Motion to Affirm, pp. 13-14.

lowed the *suggested* prescription pricing schedules. Yet, it is to be noted the evidence was uncontradicted that there was no uniform prescription pricing observed in Utah during the only period of the alleged conspiracy concerning which any evidence on uniformity was presented.[28] The schedules were used purely as guides.[29] These uncontradicted facts strongly suggest the conclusion that no conspiracy existed.

Appellant concedes that it distributed a particular pricing schedule under its corporate name to many practicing pharmacists in Utah. These schedules were intended for use as a guide or suggestion, something to stimulate thought about standards of professional fees in pharmacy (J.S., p. 21).

Appellant submits that the only substantial question regarding the issue of conspiracy is whether or not the mere publication and distribution of a prescription pricing schedule constitutes a violation, *per se*, of the Sherman Act. The establishment of such a rule of law would deny to any professional organization, including Appellant, the right to distribute a pricing schedule to its own membership under any circumstances. Appellant submits that this Court should not permit the establishment of such a novel and extensive rule except following a complete presentation of the issues in this case on the merits, including briefs and oral argument.

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[28] J. S., p. 12; 43-44, 46-47, Official Report of Proceedings, Non-Jury Trial (the transcript herein).

[29] Deposition of Albert Yeltri, pp. 18, 30-31, 37-38.

4. Absence of Conspiracy Under Rule of Reason

In considering the question whether a conspiracy to violate the Sherman Act has been proved, a district court may inquire whether the questioned conduct was justified under the so-called Rule of Reason.[30] The applicability of that doctrine to the facts in this case should be decided on the merits at this time due to the far-reaching effects of a summary affirmance entered by this Court.

If this Court should concur in the judgment below that Appellant conspired to fix prescription pricing, the Rule of Reason would be inapplicable. However, a fair reading of the record in this case leads to the conclusion that all the activities of Appellant were devoted to reasonable efforts to induce self-regulation of fees within the profession of pharmacy and, therefore, were justified under the Rule of Reason.

5. Broad Scope of Judgment

While there are similarities between the access provisions contained in the judgment below and such provisions reviewed in *United States* v. *Bausch & Lomb Optical Co.*,[31] this Court should re-examine the standards to be observed in approving the permissible scope of such access provisions under the Fourth Amendment to the Constitution of the United States. Unlike the provisions contained in *Bausch & Lomb* the judgment below contains no restriction upon the subsequent divulgence of information acquired by Appellee pursuant to the access provision. Additionally, consideration should be given to the need for providing on the

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[30] See authorities cited in Jurisdictional Statement, p. 25, f.n. 60.

[31] 321 U.S. 707 (1944).

face of the judgment that Appellant shall have the right of initial determination as to the relevancy of any such material.[32]

CONCLUSION

For the reasons and upon the authority set forth herein, and in the Jurisdictional Statement, Appellant submits that this appeal presents substantial questions which merit the plenary consideration of this Court.

Respectfully submitted,

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[32] See *United States* v. *International Nickel Co. of Canada, Ltd.*, 203 F. Supp. 739 (D.C. S.D.N.Y., 1962).

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